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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 211

SHANFEBOKE COAL & SUPPLY CORPORATION OF DELAWARE, PETITIONER,

vs.

WESTCHESTER SERVICE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 31, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE, PETITIONER,

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UNITED STATES CIRCUIT COURT
OF APPEALS,

1

FOR THE SECOND CIRCUIT.

SHANFEROKE COAL & SUPPLY CORPORATION
OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant. 2

Statement Under the Rule.

The above entitled action was commenced on February 28th, 1933.

The names of the original parties are above set forth, and there has been no change of parties since the commencement of the action.

The complaint in this action was served on February 28th, 1933, and defendant's answer was served on July 27th, 1933. 3

The motion to dismiss plaintiff's first cause of action was heard on October 6, 1933, by Judge John W. Woolsey.

The order appealed from, denying defendant's motion for a stay, was entered on the 14th day of December, 1933.

The appeal herein was taken January 12, 1934.

The plaintiff appears by Moos, Nathan, Imbrey & Levine. The defendant appears by Ehrich, Royall, Wheeler & Walter.

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. 54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE

—against—

WESTCHESTER SERVICE CORPORATION.

To the above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 23rd day of February, A. D. 1933.

CHARLES WEISER,
Clerk.

MOOS, NATHAN, IMBREY & LEVINE,
Plaintiff's Attorneys,
Office & Post Office Address,
500 Fifth Avenue,
Borough of Manhattan,
City of New York.

(Seal of Court.)

Complaint.

7

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

8

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named plaintiff, Shanferoke Coal & Supply Corporation of Delaware, appearing by Moos, Nathan, Imbrey & Levine, its attorneys, for its complaint herein alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

9 First: That at all times hereinafter mentioned, plaintiff was and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of said State.

Second: Upon information and belief that at all times hereinafter mentioned, the above named defendant was and still is a corporation, organized

10 and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office and place of business in the City of Yonkers, County of Westchester, State of New York and Southern District of New York.

Third: That the grounds upon which the jurisdiction of this Court depends are the diversity of citizenship of the parties, and the fact that the amount in dispute, exclusive of interests and costs, far exceeds the sum or value of $3,000.00.

Fourth: That heretofore and prior to January
11 25th, 1930, the plaintiff duly entered into a written agreement with The Hudson Coal Company, wherein and whereby plaintiff was granted the sole and exclusive sale agency, for the sale of anthracite coal produced by said Hudson Coal Company, in certain territories, including territories in which defendant's principal business was carried; that by virtue of and under and by the terms and conditions of said agreement, plaintiff was entitled to receive a commission on all anthracite coal, produced by said Hudson Coal Company, and sold in the said territories; that the said agreement was
12 in full force and effect at all times hereinafter mentioned.

Fifth: That on or about January 25th, 1930, defendant duly entered into a written agreement with The Hudson Coal Company, wherein and whereby the latter duly agreed to sell and deliver to the defendant, through either the plaintiff, or the North River Coal Company, or through whoever might be the wholesaler or wholesalers of The

Hudson Coal Company's anthracite in the territories in which the defendant's business was carried on, and the defendant duly agreed to purchase from The Hudson Coal Company, through such wholesaler or wholesalers, during a period of not less than three years or more than five years, beginning on February 1st, 1930, 80,000 gross tons (of 2240 lbs. to the ton) of anthracite coal, of domestic sizes, by which was meant pea, grate, egg, stove and chestnut; that it was further provided in and by said agreement that defendant would order and accept delivery of such coal, during said period, in as nearly equal monthly installments as practicable, it being duly agreed between The Hudson Coal Company and the defendant, that delivery of such coal by The Hudson Coal Company or its designated wholesaler, and its acceptance by defendant should extend over a period of not less than three years or more than five years in as even a manner as practicable.

Sixth: That under and by the terms of said agreement last mentioned defendant was obligated, at all times hereinafter mentioned, to order and accept from The Hudson Coal Company, through such of its aforementioned wholesalers as it might designate, on the average at least 1333 gross tons of coal per month.

Seventh: That at all times herein mentioned, plaintiff was the wholesaler and sole distributing agent of the Hudson Company's anthracite coal in the territories in which defendant's principal business was carried on, and was designated as the wholesaler to receive the benefit of the said agree-

16 ment between plaintiff and The Hudson Coal Company, and was accepted as such by the defendant, and plaintiff thereupon duly received orders directly from the defendant, from time to time, for the sale and delivery of anthracite coal, under the said agreement between The Hudson Coal Company and the defendant.

Eighth: That plaintiff and The Hudson Coal Company, duly performed all the terms and conditions of the said agreement, referred to in paragraph "Fifth" of this complaint, on their part to be performed, except the furnishing, sale and deliv-
17 ery of the coal hereinafter mentioned, and duly furnished coal to the defendant under said agreement, in accordance and compliance with defendant's orders.

Ninth: That defendant since December 1st, 1931, without just cause, has neglected and refused to order, accept or pay for at least an average of 1333 gross tons of coal per month, as required by its said agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has
18 failed to order or accept any coal whatsoever from plaintiff or The Hudson Coal Company; that defendant is now in default under its said agreement to the extent of approximately 20,049 gross tons of coal; that heretofore and prior to the commencement of this action defendant notified plaintiff and The Hudson Coal Company that it would not order, accept or pay for coal as provided for in its said agreement and repudiated the same.

Tenth: That plaintiff and The Hudson Coal Company were at all times ready, able and willing to perform the said agreement, referred to in paragraph "Fifth" of this complaint, with respect to furnishing, selling and delivering coal, in accordance with the terms and conditions of the said agreement, and would have furnished, sold and delivered the same according to the terms and conditions of said agreement, but for defendant's aforesaid neglect, refusal and repudiation. 19

Eleventh: That there remains to be delivered to defendant under its said agreement, in all, a balance of approximately 57,398 gross tons of coal. 20

Twelfth: That plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of its aforesaid agreement with The Hudson Coal Company, upon all coal sold and delivered by or through it to defendant, under the aforementioned agreement between The Hudson Coal Company and the defendant; that by reason of defendant's neglect, refusal and repudiation, as aforesaid, plaintiff lost and has been deprived of all commissions which it would have earned on the sale and delivery of the said balance of approximately 57,398 gross tons of coal, to its damage in the sum of $11,479.66. 21

AS AND FOR A SECOND CAUSE OF ACTION:

Thirteenth: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs marked "First", "Second", "Third", "Fourth", and "Seventh" herein, with the same force and effect as though herein fully set forth at length.

22 Fourteenth: That on or about January 22nd, 1931, plaintiff and defendant duly entered into a written agreement wherein and whereby plaintiff duly agreed to sell and deliver to defendant, and the latter duly agreed to purchase from plaintiff, during a period of not less than three years or more than five years from said date, 75,000 gross tons (of 2240 lbs. to the ton) of anthracite coal in the sizes of grate, egg, stove, chestnut, pea and buckwheat, in the proportions in which said sizes would be produced by The Hudson Coal Company; that it was further provided in and by said agreement
23 that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable, it being duly agreed between plaintiff and defendant that delivery of the said coal by plaintiff and its acceptance by defendant should extend over said period of not less than three years or more than five years in as even a manner as practicable.

Fifteenth: That under and by the terms of said agreement, defendant was obligated, at all times hereinafter mentioned, to order and accept from plaintiff, on the average, at least 1250 gross tons
24 of coal per month.

Sixteenth: That defendant since December 1st, 1931, without just cause, has neglected and refused to order, accept or pay for at least an average of 1250 gross tons of coal per month, as required by said agreement but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatsoever from plain-

tiff; that defendant is now in default under the said agreement, to the extent of approximately 16,173 gross tons of coal; that heretofore and prior to the commencement of this action, defendant notified plaintiff it would not order, accept or pay for coal as provided in its said agreement, and defendant repudiated the same. 25

Seventeenth: That plaintiff was at all times herein mentioned, ready, able and willing to perform the said agreement on its part, with respect to furnishing, selling and delivering coal in accordance with the terms and conditions of the said agreement, and would have furnished, sold and delivered the same, according to the terms and conditions of said agreement, but for defendant's aforesaid neglect, refusal and repudiation. 26

Eighteenth: That there remains to be delivered to defendant, under said agreement, in all, a balance of 52,309 gross tons of coal.

Nineteenth: That plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of its aforesaid agreement with The Hudson Coal Company, upon all coal sold and delivered by it to defendant, under the aforesaid agreement between plaintiff and defendant; that by reason of defendant's neglect, refusal and repudiation, as aforesaid, plaintiff lost and has been deprived of all commissions which it would have earned on the sale and delivery of the said balance of 52,309 gross tons of coal, to its damage in the sum of $9851.74. 27

WHEREFORE, plaintiff prays for judgment against the defendant on both causes of action for the

sum of $21,331.40, with interest thereon, and the costs and disbursements of this action.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

By A. T. GOODENOUGH,
President.
(Corporate Seal)

MOOS, NATHAN, IMBREY & LEVINE,
Attorneys for Plaintiff,
Office & P. O. Address,
500 Fifth Avenue,
Borough of Manhattan,
City of New York.

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The defendant, Westchester Service Corporation, appearing by Ehrich, Royall, Wheeler & Walter, its

attorneys, for its answer to the Second Cause of Action alleged in the complaint in this action, alleges: 31

1. The said defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "Fourth" and "Seventh" of said complaint, except so much of paragraph "Seventh" as alleges that the plaintiff received orders directly from the defendant for the sale and delivery of the anthracite coal by and from Hudson Coal Company.

2. Defendant denies each and every allegation contained in paragraphs numbered "Fifteenth", 32
"Sixteenth", "Seventeenth", and "Eighteenth" of said complaint.

3. The said defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiff was entitled to receive commissions from Hudson Coal Company upon all coal sold and delivered by it to the defendant as alleged in the paragraph of the complaint numbered "Nineteenth" and denies each and every other allegation contained in said paragraph numbered "Nineteenth" of the complaint.
33

FOR A SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

4. That at all times since January 22, 1931, defendant has been and still is ready, able and willing to purchase from plaintiff within five years from said date, 75,000 gross tons of anthracite coal pursuant to the agreement alleged in the Second Cause of Action in the complaint herein.

34 5. That between January 22, 1931 and January 1, 1933, defendant purchased from plaintiff pursuant to said agreement in excess of 17,000 gross tons of anthracite coal in as nearly equal monthly amounts as practicable under the circumstances then existing in its business and in the coal trade generally and in the prudent management of its business and affairs.

6. That prior to the commencement of this action, and on or about January 3, 1933, defendant ordered from plaintiff seven cars of anthracite coal of approximately 390 gross tons, that plaintiff
35 refused to accept said order from the defendant and in the month of January, 1933, plaintiff notified defendant that it would refuse to accept orders from defendant and to sell defendant coal pursuant to said agreement and has ever since refused to accept such orders and to ship and deliver coal to defendant under said agreement, and that by reason of such refusals on the part of the plaintiff, the defendant has been and will be unable to perform the said agreement and performance thereof by the defendant has become impossible.

36 FOR A SECOND SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

7. That the agreement alleged in the Second Cause of Action in the complaint contains the following provisions:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dis-

pute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

8. That prior to the commencement of this action, a dispute had arisen between plaintiff and defendant as to the performance and construction of said agreement alleged in the Second Cause of Action with respect to the following and other matters. That plaintiff charged defendant with being in default in the purchase of coal pursuant to said agreement, and defendant disputed and does still dispute said charge, that plaintiff refused to accept orders for coal pursuant to said agreement except under conditions laid down by it to which defendant refused to accede, that plaintiff charged that defendant had repudiated the said agreement and defendant denied said charge and asserted and does still allege that it is ready, able and willing to perform said agreement on its part and has been and still is prevented from so doing by plaintiff's refusal to accept orders from it under the said agreement and that plaintiff asserted that the alleged defaults of defendant in placing orders under said agree-

ment during the year 1932, justified plaintiff in its refusal to accept further orders from defendant during the remaining three years of the agreement and that defendant denied this and demanded and was refused the right to continue to perform said agreement subsequent to January 3, 1933.

9. That defendant has been at all times since said dispute arose and still is ready and willing to arbitrate the said dispute, and that prior to the commencement of this action, defendant notified the plaintiff of its readiness and willingness to arbitrate such a dispute and that plaintiff has refused and neglected to proceed to arbitration as provided in said contract, and that defendant is in no manner in default in proceeding with such arbitration.

WHEREFORE, defendant demands that the complaint herein be dismissed with costs.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for the Defendant,
20 Exchange Place,
New York City, New York.

(Verified by Gerald S. Couzens as president of defendant on July 26, 1933.)

Notice of Motion.

43

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

File No. L54—P. 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant. 44

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of Ernest E. Wheeler verified August 10, 1933, hereto annexed, and upon the notice of motion, dated March 25, 1933, and the affidavits of Gerald S. Couzens and Abraham H. Elkind, both verified March 24, 1933, and the papers referred to therein and made a part thereof, said notice of motion and affidavits having been filed upon an application heretofore made for the same relief now requested, 45 and upon the order of the Hon. William Bondy, dated July 18, 1933, denying said former application without prejudice to renewal thereof after defendant's answer had been served, and upon the pleadings and all proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof for the hearing of motions to be held

in and for the Southern District of New York, at the Court House, in the United States Post Office Building, located at Broadway and Park Row (Room 235), Borough of Manhattan, City of New York, on the 15th day of August, 1933, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order as provided in 9 U. S. C. A., Sec. 3, staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of the agreement entered into by and between the parties to this action and referred to in the second cause of action contained in the complaint, and for such other and further relief as to the Court may seem just.

Dated, New York, N. Y., August 10, 1933.

Yours, etc.,

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Defendant,
Office & P. O. Address,
20 Exchange Place,
Borough of Manhattan,
City of New York.

To:

Moos, Nathan, Imbrey & Levine, Esqs.,
Attorneys for Plaintiff,
500 Fifth Avenue,
New York, N. Y.

Affidavit of Ernest E. Wheeler, Read in Support of Motion.

49

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

50

State of New York,
County of New York—ss.:

ERNEST E. WHEELER, being duly sworn, deposes and says: that he is an attorney and counsellor-at-law duly admitted to practice in the Federal courts, and a member of the firm of Ehrich, Royall, Wheeler & Walter, attorneys for the defendant, and that he is familiar with all the proceedings heretofore had herein.

That heretofore defendant moved this court for an order dismissing the first cause of action, which 51
motion was granted, and an order to that effect was entered on the 18th day of July, 1933.

Simultaneously with the making of said motion defendant moved for a stay of the second cause of action pending arbitration as provided in 9 U. S. C. A., Sec. 3. On the 6th day of July 1933 an opinion was handed down by the Honorable William Bondy, which reads as follows:

"Section 3 of the United States Arbitration Act (9 U. S. C. A. Sec. 3) provides for a stay

52 of proceeding if the Court is satisfied that 'the issue involved in such suit' is referable to arbitration under the terms of the contract sued upon. Issues cannot be involved in a suit before an answer has been filed raising them.

"The Motion to stay proceeding is denied without prejudice to a renewal thereof after defendant's answer has been filed.

Dated, July 6, 1933.

WM. BONDY,
U. S. D. J."

53 In conformance with this opinion an order was duly made by Judge Bondy on the 18th day of July 1933, reading as follows:

"ORDERED that said motion be and the same hereby is denied without prejudice to a renewal thereof after the defendant's answer has been duly served and filed, and leave is hereby granted to defendant to serve and file its answer within ten days after the entry herein of this order."

Defendant's answer was served on the 27th day of
54 July 1933 and thereafter duly filed. Copies of the pleadings will be submitted herewith.

Defendant now renews its motion for a stay pending arbitration upon the affidavits and papers submitted on the former motion for the same relief and upon the complaint and answer.

The plaintiff has moved to strike out the first and second separate defenses contained in the answer, and defendant now makes this motion for a stay

pending arbitration returnable at the same time as a matter of convenience. 55

WHEREFORE, deponent prays for an order staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of an agreement entered into by and between the parties to this action, and referred to in the second cause of action contained in the complaint, and for such other and further relief as to the Court may seem just.

(Sworn to by Ernest E. Wheeler on August 10, 1933.) 56

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against— 57

WESTCHESTER SERVICE CORPORATION,

Defendant.

Sirs:

PLEASE TAKE NOTICE, that upon the complaint herein, and upon the affidavit of Gerald S. Couzens, verified the 24th day of March, 1933, and here-

to annexed, upon the affidavit of Abraham H. Elkind, verified the 24th day of March, 1933, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof, for the hearing of motions, to be held in and for the Southern District of New York, at the Court House in the United States Post Office Building, located at Broadway and Park Row (Room 235), Borough of Manhattan, City of New York, on the thirty-first day of March, 1933, at ten-thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order as provided in 9 U. S. C. A. §3, staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of an agreement entered into by and between the parties to this action, and referred to in the complaint; and for such other and further relief as to the Court may seem just.

Dated, New York, N. Y., March 25, 1933.

Yours, etc.,

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Defendant,
Office and P. O. Address,
20 Exchange Place,
New York, N. Y.

To:

MOOS, NATHAN, IMBREY & LEVINE, ESQS.,
Attorneys for Plaintiff,
500 Fifth Avenue,
New York, N. Y.

Affidavit of Gerald S. Couzens, Read in Support of Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

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State of New York,
County of Westchester—ss.:

GERALD S. COUZENS, being duly sworn, deposes and says that he is the President of Westchester Service Corporation, the defendant herein, and is familiar with facts and circumstances involved in the matters set forth in the complaint in this action. The complaint herein was served on the 28th day of February, 1933. No answer by defendant has been served or filed.

This is a motion to stay all proceedings pending an arbitration between the parties as provided by the terms of a contract entered into between them dated the 22nd day of January, 1931, and referred to in the Second cause of action set forth in the complaint. A true copy of said contract upon which the Second cause of action in the complaint is based is annexed hereto and marked Exhibit "A". Said contract contains the following clause:

63

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agree-

64 ment, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this
65 arbitration agreement in accordance with the arbitration laws of the State of New York."

A dispute has arisen between the Shanferoke Coal & Supply Corporation of Delaware, the plaintiff, and the Westchester Service Corporation, defendant, the parties to said agreement, as to the performance of the terms of the same, as appears from the following facts:

Subsequent to the execution of the agreement and in accordance with the provisions thereof, the defendant herein from time to time ordered the shipment of coal and the plaintiff complied with
66 said orders, to and including the month of December, 1932, during which month between the 17th and 31st days thereof, the defendant gave and the plaintiff accepted and filled orders under the contracts alleged in the complaint for ten cars of coal of a total weight of about 390 tons.

On the 3rd day of January, 1933, the defendant pursuant to the terms of the contract, placed an order for the shipment of seven cars of coal which would contain in excess of 250 tons. A true copy

of said order is hereto annexed and marked Exhibit 67
"B". That thereafter the defendant received from the plaintiff a letter dated January 5, 1933, a true copy of which is hereto annexed and marked Exhibit "C". As appears from this letter, the plaintiff charged the defendant with being in default in the placing of orders under existing contracts and refused to accept the order so placed (Exhibit "B") and to make shipments unless defendant conceded that the acceptance of the same was without prejudice to rights which the plaintiff claimed existed in its favor.

That as appears from the affidavit hereto an- 68
nexed of Abraham H. Elkind, a vice-president of the defendant, the said Elkind, shortly after the receipt of the letter marked Exhibit "C" conversed with one A. T. Goodenough, President of plaintiff, with reference to the same, and urged that the defendant was not in default under the existing contracts and that the orders be accepted as under the contract, without any commitments as to the rights of the parties at that particular time. Said Goodenough in his conversation in substance agreed that he saw no reason why his company should not fill the said order for seven cars of coal and that it would do so. Thereafter defendant received 69
a letter dated January 10, 1933, from one Louis H. Moos, a member of the firm of attorneys now representing the plaintiff, a true copy of which letter is hereto annexed and marked Exhibit "D". As appears from this letter the plaintiff, through its attorneys, has finally declined to ship under the order so given. That on January 11, 1933, and after the receipt by the defendant of said letter marked Exhibit "D", deponent conversed with said A. T.

70 Goodenough and again urged that the order of January 3, 1933, Exhibit "B", be accepted so that defendant might fulfill its obligations under existing contracts with the plaintiff, and that said Goodenough in substance stated his willingness to fill said order but that a contrary decision had been made by others. Prior to the giving of the order for the seven cars as above stated, deponent on behalf of defendant, had some discussion with the officers of the plaintiff, as to the provision of said contract contained in the First paragraph thereof, referring to the spreading over the period of the
71 contract of the orders for said coal and the delivery thereof, and that no claim was made on the part of the plaintiff in any of said conversations or otherwise prior to January 5, 1933, that defendant was in default in purchasing coal under its agreement with the plaintiff.

From all of the foregoing, and from the fact that this action has been instituted, it fully appears that a dispute has arisen between the buyer and the seller as to the performance of the terms of the agreement.

Deponent on behalf of his company, has discussed with the officers of the plaintiff, the arbi-
72 tration of this dispute and has always stood ready and willing to arbitrate the same in accordance with the provisions of the contract, and the defendant is in no way in default in proceeding with said arbitration.

The defendant is now ready and willing, and has always been ready and willing to comply with all of the terms of said contract, and to order and accept within the period set out in the contract, the amount of coal required to be so ordered.

Affidavit of Gerald S. Couzens.

This contract has about three years still to run, 73
and deponent respectfully calls the attention of the Court to the fact that, due to the refusal of the plaintiff to accept its orders, it is prevented from complying with the terms of the contract, and is thus deprived of the opportunity of relieving itself of any possible liability to the plaintiff which may now or in the future exist.

Deponent believes that the dispute which has arisen is of the nature contemplated by the agreement and of the kind which may be most promptly and justly settled by arbitration. As appears from said contract the same evidences a transaction involving commerce among the several states as 74
defined by the Federal Statute establishing the validity, irrevocability and enforcement of agreements to arbitrate.

WHEREFORE, deponent prays that an order may enter herein, staying the trial of this action and all proceedings herein, until an arbitration has been had in accordance with the terms of said agreement, and deponent further prays for an order extending the defendant's time to answer until ten days after the entry of an order on this application if the same shall be denied. 75

(Sworn to by Gerald S. Couzens on March 24, 1933.)

EXHIBIT "A", ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

76 THIS AGREEMENT made, entered into and executed in triplicate on this 22nd day of January, 1931, by and between SHANFEROKE COAL AND SUPPLY CORPORATION OF DELAWARE, a Delaware corporation with its principal office and place of business in the City of New York, State of New York, hereinafter called the "Seller," party of the first part, WESTCHESTER SERVICE CORPORATION, a New York corporation having its principal office and place of business in the City of Yonkers, State of New York, hereinafter called "Buyer," party of the
77 second part, and the S. FOY COAL COMPANY, INC., a New York corporation, with its principal office and place of business in the City of New York, State of New York, hereinafter called the "Foy Company," party of the third part.

WITNESSETH:

WHEREAS, the Seller is engaged in the wholesale fuel business and is affiliated with the Foy Company, which is engaged in the retail fuel business in the cities of New York and Yonkers; and

78 WHEREAS, the Buyer is engaged in the retail fuel business in the City of Yonkers and the vicinity and desires to secure from the Seller certain additional tonnage of anthracite in the amount and in accordance with the terms and conditions hereinafter stated, and to secure from the Foy Company that company's good will in the city of Yonkers; and

WHEREAS, the Seller is willing to supply the tonnage hereinafter provided for and the Foy Com-

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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pany is willing to dispose of its fuel business in the city of Yonkers, all in accordance with the terms and conditions stated.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto hereby agree as follows:

FIRST: The Seller agrees to sell and deliver to the Buyer and the Buyer agrees to purchase from the Seller, f.o.b., railroad cars at the mines of The Hudson Coal Company, in Pennsylvania, during a period of not less than three years or more than 80
five years, beginning on the date of this agreement, seventy-five thousand (75,000) gross tons (2,240 lbs.) of anthracite, in the sizes of grate, egg, stove, chestnut, pea and buckwheat in the proportions in which said sizes are produced by said The Hudson Coal Company (it being understood between the parties that the Seller will furnish said sizes in the proportions demanded by the Buyer's retail customers, provided such demand be reasonably within the proportions in which said sizes are produced by The Hudson Coal Company) at the prices and upon the terms and conditions herein- 81
after set forth. It is expressly understood and agreed that the Buyer will order and accept delivery of said anthracite, during such period, in as nearly equal monthly installments as is practicable; it being intended that the delivery of said anthracite by the Seller and its acceptance by the Buyer shall be spread over such period of not less than three years or more than five years in as even a manner as is practicable.

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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SECOND: The Seller agrees that all of said anthracite shall be of the current standard of preparation and size.

THIRD: The Seller agrees to deliver said anthracite from time to time, during such period, on railroad cars at the mines of The Hudson Coal Company, in Pennsylvania, upon the Buyer's orders when and as the same are received by the Seller and, at the request of the Buyer to act as agent for the buyer in consigning and waybilling said anthracite as the Buyer shall direct. It is
83 agreed that the Seller shall assume no responsibility whatsoever in connection with such arrangements with the transportation companies or for any default on the part of the transportation companies.

FOURTH: The prices to be charged by the Seller and paid by the Buyer for said anthracite sold and delivered, pursuant to the terms of this agreement, shall be the "Seller's circular prices" for anthracite of the sizes purchased by the Buyer in effect at the time shipment is made, provided, however, that if the "Seller's circular prices" for the size or
84 sizes of anthracite purchased by the Buyer at the time of any shipment shall be higher than the then average current circular prices for anthracite of the same size or sizes computed on an f.o.b., mine basis charged by the Delaware, Lackawanna and Western Coal Company (or whoever may market the anthracite produced from the mines now owned by the Glen Alden Coal Company), the Lehigh Valley Coal Sales Company and The Pittston Company, then the prices to be charged by the Seller

and paid by the Buyer for any such shipment shall be the average current circular prices of said three companies for anthracite of the sizes purchased in effect at the time of such shipment. For the purpose of this agreement the term "Seller's circular prices" shall mean the current circular prices of the Seller for anthracite in the sizes hereinbefore referred to, computed on an f.o.b., mine basis. 85

FIFTH: The Buyer agrees to pay for all anthracite purchased by it during any calendar month of the period of this agreement, in full in New York funds on the twenty-fifth day of the month succeeding the month in which deliveries of such anthracite f.o.b., mines are made to the Buyer by the Seller. If the Seller shall extend to its customers generally longer terms of credit than herein set forth, the Buyer shall be entitled to the benefit of such longer terms in paying for coal purchased under this contract. 86

SIXTH: Deliveries by the Seller and acceptance by the Buyer under this agreement are subject to any one or more of the following causes, viz., fire, flood, strikes, war, insurrections, or mob violence and to the extent that the Seller is prevented from making delivery of the coal sold hereunder by any of the foregoing causes shall be relieved from liability for damages or failure arising therefrom and shall not be obligated to make up nor shall the Buyer be obligated to receive any tonnage deficiency arising therefrom. 87

SEVENTH: It is agreed by the Buyer that in the event the terms and provisions of this agreement,

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

or any of them, are not fully and completely performed and observed by it, the Seller may, at its option, terminate this agreement and thereupon the Buyer agrees to pay to the Seller the sum of Ten Thousand Dollars ($10,000.00) as liquidated damages; which sum shall be in full settlement and discharge of all the buyer's obligations under this contract except any indebtedness for coal previously purchased.

A. E. S.
G. S. C.
L. A. D.

EIGHTH: The Foy Company agrees to and does hereby sell, assign, transfer and convey to the Buyer, its good will in the fuel business now being conducted by it in the city of Yonkers, and agrees to assign to the Buyer all its right, title and interest in (1) a certain lease, dated April 4, 1929, between David E. Allen Yonkers Foundry, Inc., as lessor, and the S. Foy Coal Company, Inc., as lessee, and (2) a certain lease, dated November 1, 1929, between The New York Central Railroad Company, as lessor, and the S. Foy Coal Company, Inc., as lessee, in consideration of the assumption by the Buyer of all the obligations of the said lessee under said leases, and an agreement by the Buyer to indemnify and save harmless the Foy Company from any claim against the Foy Company, its successors or assigns, incident to the said leases; it being understood and agreed that the Foy Company will secure the consents of the lessors to the assignments of said leases to the Buyer, and will thereafter execute and deliver to the Buyer, suitable instruments of assignment of said leases; said instruments to contain said assumption of obligations of the lessee thereunder by the Buyer, and said indemnification of the Foy

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

Company by the Buyer, and to be executed both by the Foy Company and the Buyer. 91

NINTH: It is understood and agreed by and between the parties hereto that the Buyer shall have the right to use the name "Foy Fuel Company," in the conduct of its retail anthracite business in the city of Yonkers; that the Buyer agrees not to do any business of any nature whatsoever in said name, or in any other name with the name "Foy" therein, outside of the city of Yonkers, New York, and that the Foy Company agrees not to conduct any retail anthracite business in the city of Yonkers, New York. 92

TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York. 93

ELEVENTH: This agreement shall be binding upon the successors of the parties hereto, but shall

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not be assigned by either party without the consent of the other party being given in writing.

IN WITNESS WHEREOF, the parties hereto have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed and attested by their proper officers thereunto duly authorized, the day and year first above written.

SHANFEROKE COAL AND SUPPLY CORPORATION OF DELAWARE,

95 By A. E. SLOAT, Vice-President.

Attest: STUART BAVIER,
(Seal) Secretary.

WESTCHESTER SERVICE CORPORATION,

By G. S. COUZENS, President.

Attest: J. W. OBRIST,
(Seal) Assistant Treasurer.

S. FOY COAL COMPANY, INC.,

96 By LEO A. DOBBINS, President.

Attest: STUART BAVIER,
(Seal) Secretary.

Approved as to form,
THOMAS L. ERMIS,
Attorney.
1/15/31

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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State of New York,
County of New York—ss.:

On the 22d day of January, One thousand nine hundred and thirty-one, before me personally appeared A. E. Sloat, to me known, who, being by me duly sworn, did depose and say that he resides in the Town of Montclair, New Jersey; that he is Vice-President of Shanferoke Coal and Supply Corporation of Delaware, one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instru- 98
ment is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

CELIA SACHS,
Notary Public,
New York County No. 8.
New York Register No. 2-S-126.
My Commission expires March 30, 1932.

State of New York, 99
County of New York—ss.:

On the 21st day of January, One thousand nine hundred and thirty-one, before me personally appeared G. S. Couzens; to me known, who, being by me duly sworn, did depose and say that he resides in Yonkers, N. Y., that he is President of Westchester Service Corporation, one of the corporations described in and which executed the foregoing

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

100 instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

G. F. ROHLING,
Notary Public,
Notary Public, Westchester County, N. Y.
Term Expires March 30, 1932.

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101 State of New York,
County of New York—ss.:

On the 20th day of January, One thousand nine hundred and thirty-one, before me personally appeared Leo A. Dobbins, to me known, who, being by me duly sworn, did depose and say that he resides in Armonk, N. Y.; that he is President of the S. Foy Coal Company, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said
102 corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

ROBERT GRANER,
Notary Public,
Westchester County,
Cert. filed in Bronx Co. No. 23.
Cert. filed in N. Y. Co. No. 1193.
Commission expires March 30, 1934.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

WESTCHESTER SERVICE CORPORATION
Manufacturers and Distributors
ICE—COAL—FUEL OIL—BUILDERS' SUPPLIES
General Offices: 435 South Broadway

Yonkers, N. Y., Jan. 3rd, 1933

Purchasing Department
Ship to Westchester Service Corp'n.,
Care of Westside Division,
Oak & West Street,
Purchase Order No. 7837
At Mt. Vernon, New York.
Requisition No.
Via N.Y.C.—Harlem Division

Shanferoke Coal & Supply Co.,
521 Fifth Avenue,
New York City.

MAILING INSTRUCTIONS
Forward 2 copies of invoice; also bill of lading and copies of packing list to 435 South Broadway, Yonkers, N. Y.

Purchase Order Number and Destination of Shipment Must Appear on all Invoices

Terms F.O.B. Mines

Quantity	Unit	
3	cars	D & H Stove Coal
3	"	D & H Nut Coal
1	"	D & H Pea Coal

A/C Contract.

J. H. Z.
Purchasing Agent

EXHIBIT C, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS

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SHANFEROKE COAL AND SUPPLY CORPORATION

OF DELAWARE

521 Fifth Ave., New York

Arthur C. Wadley
Chairman of the Board

Arthur T. Goodenough
President

Arch E. Sloat
Vice President

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Stuart Bavier
Secretary and Treasurer

January 5, 1933.

Westchester Service Corporation,
395 South Broadway,
Yonkers, New York.

Gentlemen:—

We are in receipt of your order for seven cars of coal under pending contracts.

108 The writer has already called to your attention on various occasions that you have been for a considerable time in default in the placement of orders under the two existing contracts. Accordingly, we find it impossible under existing conditions to accept your order and ship same unless it is clearly understood that such acceptance and shipment are without prejudice to our rights as they exist at the present time.

If it is thoroughly understood that the acceptance and shipment of this order are without waiver

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of any of our rights to enforce the two contracts and that such acceptance and shipment shall not be deemed or understood to be an admission on our part that you have been excused from strict compliance with the performance of the contracts in question, we shall be glad to accept and ship the present order.

Very truly yours,

A. GOODENOUGH
President

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EXHIBIT D, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

Law Offices
MOOS, NATHAN, IMBREY & LEVINE
Telephone Pennsylvania 6-3020
Cable Address "BREYIM"

Louis H. Moos
Alfred B. Nathan
S. Howard Imbrey
George X. Levine

500 Fifth Avenue, New York 111
Jan. 10, 1933.

Westchester Service Corporation,
395 South Broadway,
Yonkers, N. Y.

Dear Sirs:

Shanferoke Coal & Supply Corporation of Delaware and the Hudson Coal Company have consulted us concerning the two contracts made by

Exhibit D, Annexed to Affidavit of Gerald S. Couzens.

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you with them and have further advised us of the facts in relation to your breach of these contracts.

Our clients have placed before us your order No. 7837, dated January 3, 1933, together with a copy of the letter sent you by the Shanferoke Coal & Supply Corporation, dated January 5, 1933. Mr. Goodenough, the president of the Shanferoke Coal & Supply Corporation, has told us that your Mr. Elkind phoned him today and stated in substance that your company would not acquiesce in the sug-

113 gestion made in the letter of the 5th inst., but, on the contrary, took the position that the order for seven cars of coal was sent under the contracts and that our clients could either ship same under the contracts or cancel the order. In view of the circumstances, we have advised our clients that it would be inadvisable to ship the coal on this order.

Our clients have now instructed us to take such action as we may deem advisable in the premises.

Very truly yours,

(Signed) LOUIS H. MOOS.

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Affidavit of Abraham H. Elkind, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK. 115

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
City of Yonkers,
County of Westchester—ss.:

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ABRAHAM H. ELKIND, being duly sworn, deposes and says that he is a vice-president of Westchester Service Corporation, the defendant in this action.

That subsequent to the receipt of plaintiff's letter, dated January 5, 1933, being Exhibit "C" referred to in the annexed affidavit of Gerald S. Couzens, deponent talked with Mr. A. T. Goodenough, president of the plaintiff, about the said letter and the defendant's order dated January 3, 1933, for seven cars of coal, being Exhibit "B" referred to in the said affidavit of Gerald S. Couzens. That deponent in said conversation in substance stated to the said A. T. Goodenough 117 that under defendant's understanding of the intent and effect of the two contracts mentioned in said letter the defendant was not then in default in placing orders, that defendant desired to fulfill its obligations under the said contracts, and urged that until the dispute as to the question of any existing default on the part of the defendant had been settled in the proper manner, the plaintiff accept the defendant's said order dated January 3, 1933 for seven cars of coal and apply the same against the coal which defendant was required to

118 purchase under the said contracts. That the said A. T. Goodenough in the said conversation in substance stated to deponent that he saw no reason why the order could not be accepted by the plaintiff and applied as a purchase under the existing contracts and that it would be so accepted and the coal ordered would be shipped in due course.

That the said order was not accepted by plaintiff and the coal covered by said order was not shipped by it and that defendant was compelled to purchase it from others.

(Sworn to by Abraham H. Elkind on March 24,
119 1933.)

Answering Affidavit of A. T. Goodenough, Read in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

120 WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
County of New York,
Southern District of New York—ss.:

A. T. GOODENOUGH, being duly sworn, deposes and says: That he is the president of the plaintiff corporation, and fully familiar with all facts and circumstances involved herein.

Answering Affidavit of A. T. Goodenough.

That he has read the affidavits of Gerald S. Couzens and Abraham H. Elkind, sworn to March 24th, 1933, and the affidavit of Ernest E. Wheeler, sworn to August 10th, 1933, in support of defendant's motion for a stay, and makes this affidavit in opposition thereto. 121

Although defendant contends that arbitration should be had under the contract involved in the second cause of action, it fails to state the specific matters or issues which it seeks to arbitrate, or which could be arbitrated. The fact is, that there are no disputes or controversies between the parties, which could be properly referred to arbitration. 122

Under the terms of the agreement of January 22nd, 1931, upon which the second cause of action is based, defendant became obligated to purchase from plaintiff, during a period of not less than three years or more than five years from the date of the agreement, 75,000 gross tons (of 2240 lbs. to the ton) anthracite coal, consisting of certain sizes, in the proportions in which said sizes would be produced by the Hudson Coal Company, it being further agreed that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable. Defendant, however, failed to comply with the requirements of this agreement. Thus, defendant was in default to the extent of approximately 16,173 gross tons of coal when this suit was instituted in March, 1933, even on the basis of a five year term. 123

Defendant first began to fall behind its quota in the winter of December, 1931. Its default became more evident in the spring of 1932. Deponent thereupon communicated with defendant's vice-

124 president, Mr. Elkind, and called his attention to the fact that defendant was not living up to its agreement and that it was far behind in its quota.

Mr. Elkind admitted that defendant had not been ordering and purchasing coal in the quantities required by its said contract, but explained that defendant's failure to do so was due to business conditions, and promised that defendant would make up the arrears in the fall, when conditions were expected to improve.

Thereafter, defendant continued in default. In September, 1932, deponent again communicated
125 with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears in the quantity of coal that it was obliged to order and purchase from plaintiff. Mr. Elkind gave deponent further assurance that defendant would make up its arrears shortly.

These assurances were not carried out, and in December, 1932, at which time defendant was substantially in default under its said contract, deponent arranged a conference with Mr. Elkind at the latter's office, for the purpose of discussing the situation with a view towards having defendant make up its arrears, in accordance with the prom-
126 ises and assurances theretofore given.

This conference was held on December 5th, 1932. Present at the meeting with deponent, was Mr. Hayes, plaintiff's New York sales manager, whose affidavit is hereto annexed. Mr. Couzens was also present during part of the meeting.

At this conference, deponent again pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in

accordance with the assurance theretofore given, to 127
eliminate the arrears. *Mr. Elkind, after some discussion, stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with its contract, was that defendant could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract between plaintiff and defendant. Mr. Elkind stated further that, unless plaintiff agreed to modify the existing contract by reducing the price of its coal, defendant would not order or purchase any coal from plaintiff.*

Despite deponent's attempt to persuade Mr. 128
Elkind that defendant live up to the terms of its contract, the latter refused to change his postion and asserted that defendant could not and would not purchase any coal from plaintiff unless the prices required to be paid under the agreement were reduced. Deponent, after consultation with his associates, found that no such arrangement could be made, and, finally, so advised Mr. Elkind.

Thereafter, defendant continued in default under its said agreement and failed to order or purchase any coal from plaintiff, with the exception of one order of January 3rd, 1933, for a small quantity of coal. Defendant, at this time, was substantially in 129
default under its said contract.

Plaintiff, however, was willing to fill this order on condition that its acceptance of the order be without prejudice to plaintiff's rights under the contracts. Defendant, however, refused to accede to this request, and accordingly, the shipment could not be effectuated.

130 The purported substance of the conversation between deponent and Mr. Elkind, upon the latter's receipt of plaintiff's letter dated January 5th, 1933 (Exh. C), as recited in the moving papers, is grossly inaccurate. Mr. Elkind made no assertion during said conversation, either in words or substance, that defendant was not in default in placing orders and did not urge, as now claimed, that the question of any existing default be settled in a proper manner. Nor did deponent state, as claimed in the moving papers, that he saw no reason why the order (of January 3rd, 1933) could not be ac-
131 cepted by plaintiff and applied as a purchase under the existing contract and that it would be so accepted and coal shipped in due course.

Mr. Elkind, in substance, stated that his concern would not acquiesce to the conditions referred to in deponent's letter of January 5th, 1933 (Exh. C), and that plaintiff could either ship the coal or cancel the order. Deponent informed Mr. Elkind that plaintiff could not make the shipment except without prejudice to its rights. A letter confirming this position was sent to defendant by plaintiff's counsel on January 10th, 1933 (Exh. D). In view of the contents of this letter, it is evident that the moving
132 papers do not state correctly the substance of deponent's talk with Mr. Elkind.

Mr. Couzen's statement at page 3 of his affidavit that, after receipt by defendant of said letter, deponent expressed a willingness to fill defendant's order of January 3rd, 1933, but stated that a contrary decision had been made by others, is inaccurate. Deponent merely advised Mr. Couzens that he was willing to fill the order, but only upon the

condition that it be deemed without prejudice to 133
plaintiff's rights.

It is evident from the foregoing circumstances that there is no actual denial that defendant is in default under its said agreement with plaintiff. In this regard, it should be noted that nowhere in the moving papers does there appear any unequivocal assertion that defendant is not in default under its said agreement. On the other hand, the facts hereinabove adverted to, show clearly that defendant was in default to the extent of approximately 16,-173 gross tons of coal, when this action was commenced, and that it has repudiated its agreement 134
with plaintiff and has definitely taken the unjustifiable position that it will not perform its contract, unless plaintiff complies with its arbitrary demand for a reduction in price.

Manifestly, under the circumstances, there is not and cannot be any dispute or controversy between the parties that can be referred to arbitration. Defendant's default is so evident, and apparently is not denied, that there is no arbitrable dispute or controversy in that regard. Certainly, defendant cannot arbitrarily demand a modification of the agreement and upon such demand being declined, refuse to abide by the terms of the agree- 135
ment, and then seek arbitration. Under such circumstances there is no dispute and there is nothing to arbitrate.

The only question left for determination, is the amount of damages sustained by plaintiff as a result of defendant's breach of contract. This question, however, cannot be determined by arbitration. A mere assessment of damage, divorced from the determination of any other dispute between the parties, does not fall within the purview of

136 arbitration. The arbitration law of the State of New York, as deponent has been advised by plaintiff's attorneys and verily believes, does not extend to or include within its embracement assessments of damage, appraisals or the like, where such matters constitute the sole issue between the parties.

Since it appears clearly that there is no arbitrable dispute between the parties, it is evident that arbitration could not be had. It follows, therefore, that defendant is not entitled to stay proceedings. The granting of a stay until arbi-
137 tration is had, obviously, would be a futility and improper, where it appears, as it does in the present case, that there is no dispute which can be arbitrated. Hence, for this reason alone, defendant's application should be denied.

There is a further objection which deponent believes is fatal to defendant's motion. The agreement upon which defendant bases its right to arbitration and to a stay, provides for arbitration in accordance with the arbitration laws of the State of New York. Consequently, arbitration, if had, would proceed solely in accordance with the requirements of the New York statute relating to
138 arbitration. Deponent submits that this Court has no jurisdiction to compel the parties to arbitrate in accordance with the laws of the State of New York, since that statute is purely remedial and created no substantive rights that could be enforced by a Federal Court. Since this Court would have no jurisdiction to compel arbitration in the instant case, it follows that it has no jurisdiction to stay proceedings until arbitration is had. And as a matter of law, deponent has been ad-

vised by plaintiff's attorneys and verily believes, 139
this Court may not grant a stay under the provisions of the New York Arbitration Law.

Furthermore, it is submitted that defendant is estopped from seeking arbitration or a stay of proceedings in connection therewith, due to the fact that it has appeared and participated, on the merits, in this litigation. Thus, defendant heretofore served a notice of general appearance, by its present attorneys, in this action, and obtained several stipulations extending its time to answer to the complaint herein. Defendant also has moved to dismiss the first cause of action contained in the complaint herein, on the alleged ground that the 140
same fails to state facts sufficient to constitute a cause of action. In addition, defendant has now served an answer to the complaint. Under these circumstances, it is clear that defendant has waived any right it may have had to demand arbitration.

It should be noted further that defendant seeks a stay of the trial of this action and all proceedings herein, until arbitration has been had in accordance with the terms of the aforementioned agreement, a copy of which is annexed to the moving papers. This agreement is the one upon which plaintiff's second cause of action is predicated, 141
and provides for arbitration of disputes arising thereunder. The agreement does not cover disputes between the parties arising out of or in connection with other agreements or circumstances. It is apparent, therefore, that, under this agreement, defendant cannot seek to compel arbitration of any controversy between the parties arising out of the

142 agreement referred to in plaintiff's first cause of action. This point is urged because plaintiff intends to and will appeal from the order and judgment dismissing its first cause of action, and, therefore, does not desire to be prejudiced in the enforcement thereof, should it succeed on its appeal.

The agreement for the sale of coal, upon which the first cause of action is based, is an entirely different agreement, and is prior in date to that upon which the second cause of action is predicated. Defendant does not seek arbitration under this prior agreement. Consequently, defendant, under
143 any circumstances, is not entitled to stay proceedings in so far as plaintiff's first cause of action is concerned.

It is submitted, however, that defendant has failed to make out a proper case for arbitration, and, therefore, that it is not entitled to the incidental relief now sought.

WHEREFORE, deponent respectfully prays that defendant's motion for a stay be denied in all respects.

(Sworn to by A. T. Goodenough on August 30,
144 1933.)

Answering Affidavit of Mark J. Hayes, Read in Opposition to Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

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State of New York,
County of New York,
Southern District of New York—ss.:

MARK J. HAYES, being duly sworn, deposes and says: That he is the New York sales manager for the plaintiff corporation, and was present at the conference of December 5th, 1932, referred to in the annexed affidavit of A. T. Goodenough, sworn to the 30th day of August, 1933.

That deponent has read the said affidavit, and that the statements therein contained, concerning 147
the said conference and the conversation had thereat, are true.

(Sworn to by Mark J. Hayes on August 30, 1933.)

Answering Affidavit of Benjamin Lewis, Read in Opposition to Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

149 State of New York,
County of New York,
Southern District of New York—ss.:

BENJAMIN LEWIS, being duly sworn, deposes and says: That he is an attorney associated with Moos, Nathan, Imbrey & Levine, the attorneys for the plaintiff in the above action, and that he is familiar with the facts and circumstances involved and proceedings had herein.

Deponent desires to call the Court's attention to the fact that the statements contained in plaintiff's answering affidavit, concerning defendant's
150 default and repudiation of its agreement, are neither explained nor denied by defendant. The latter's failure to take issue with plaintiff's statements regarding defendant's default and repudiation of its contract, is highly significant, in view of the fact that heretofore, in April, 1933, on the argument of the defendant's prior motion for a stay of proceedings, deponent gave defendant's attorney a copy of plaintiff's answering affidavit, which was substantially similar in content to plaintiff's present answering affidavit.

It is apparent, therefore, that defendant, at the 151
time it renewed its motion for a stay, was fully familiar with the nature of plaintiff's contentions regarding defendant's default and repudiation of its agreement. Defendant's failure to take issue with plaintiff's contentions, in this connection, or to make any explanation in regard thereto, must be deemed an admission of the truth of plaintiff's charges. Under the circumstances, it is clear that there is no bona fide dispute concerning the performance of the contract which is referable to arbitration. It follows, therefore, that defendant is not entitled to a stay of proceedings until arbi- 152
tration is had.

Deponent desires to call the Court's attention, also, to the fact that defendant, despite its alleged readiness and willingness to arbitrate, has neglected to show that it took any affirmative steps to compel arbitration. Defendant does not claim that it appointed, or sought to appoint an arbitrator, or that it ever demanded arbitration.

Furthermore, it should be noted that, although more than three months have elapsed since defendant's first application for a stay of proceedings, defendant has failed to take any affirmative steps to compel arbitration, either in the State Court or 153
the Federal Court. In fact, defendant has at no time made any application to compel arbitration. Defendant's failure to take any affirmative steps to compel arbitration, although, admittedly, it has had more than ample opportunity to do so, must be considered as a waiver of any rights on its part under the arbitration clause. The fact that, even now, defendant seeks only a stay, and does not attempt to compel arbitration, shows clearly that

154 defendant is interested in gaining delay only and that it never really desired to arbitrate.

WHEREFORE, deponent respectfully prays that defendant's application for a stay be denied in all respects.

(Sworn to by Benjamin Lewis on September 1, 1933.)

Answering Affidavit of A. T. Goodenough, Read in Opposition to Motion.

155 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
County of New York,
156 Southern District of New York—ss.:

A. T. GOODENOUGH, being duly sworn, deposes and says: That he is the president of the plaintiff corporation, and fully familiar with all facts and circumstances involved herein.

That he has read the affidavits of Gerald S. Couzens and Abraham H. Elkind, sworn to March 24th, 1933, in support of defendant's motion for a stay, and makes this affidavit in opposition thereto.

Although defendant contends that arbitration 157
should be had under the contract involved in the second cause of action, it fails to state the specific matters or issues which seeks to arbitrate, or which could be arbitrated. The fact is, that there are no disputes or controversies between the parties, which could be properly referred to arbitration.

Under the terms of the agreement of January 22nd, 1931, upon which the second cause of action is based, defendant became obligated to purchase from plaintiff, during a period of not less than three years or more than five years from the date 158
of the agreement, 75,000 gross tons (of 2,240 lbs. to the ton) of anthracite coal, consisting of certain sizes, in the proportions in which said sizes would be produced by the Hudson Coal Company, it being further agreed that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable. Defendant, however, failed to comply with the requirements of this agreement. Thus, defendant was in default to the extent of approximately 16,173 gross tons of coal when this suit was instituted in March, 1933.

Defendant first began to fall behind its quota 159
in the winter of December, 1931. Its default became more evident in the spring of 1932. Deponent thereupon communicated with defendant's vice-president, Mr. Elkind and called his attention to the fact that defendant was not living up to its agreement and that it was far behind in its quota.

Mr. Elkind admitted that defendant had not been ordering and purchasing coal in the quantities required by its said contract, but explained

160 that defendant's failure to do so was due to business conditions, and promised that defendant would make up the arrears in the fall, when conditions were expected to improve.

Thereafter, defendant continued in default. In September, 1932, deponent again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears in the quantity of coal that it was obliged to order and purchase from plaintiff. Mr. Elkind gave deponent further assurance that defendant would make up its arrears shortly.

161 These assurances were not carried out, and in December, 1932, at which time defendant was substantially in default under its said contract, deponent arranged a conference with Mr. Elkind at the latter's office, for the purpose of discussing the situation with a view towards having defendant make up its arrears, in accordance with the promises and assurances theretofore given.

This conference was held on December 5th, 1932. Present at the meeting with deponent, was Mr. Hayes, plaintiff's New York sales manager, whose affidavit is hereto annexed. Mr. Couzens was also present during part of the meeting.

162 At this conference, deponent again pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears. Mr. Elkind, after some discussion, stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with its contract, was that defendant could obtain coal from other sources at prices lower than those required to be paid by the

terms of the contract between plaintiff and de- 163
fendant. Mr. Elkind stated further that, unless plaintiff agreed to modify the existing contract by reducing the price of its coal, defendant would not order or purchase any coal from plaintiff,

Despite deponent's attempt to persuade Mr. Elkind that defendant live up to the terms of its contract, the latter refused to change his position and asserted that defendant could not and would not purchase any coal from plaintiff unless the prices required to be paid under the agreement were reduced. Deponent, after consultation with his associates, found that no such arrangement 164
could be made, and, finally, so advised Mr. Elkind.

Thereafter defendant continued in default under its said agreement and failed to order or purchase any coal from plaintiff, with the exception of one order of January 3rd, 1933, for a small quantity of coal. Defendant, at this time, was substantially in default under its said contract.

Plaintiff, however, was willing to fill this order on condition that its acceptance of the order be without prejudice to plaintiff's rights under the contracts. Defendant, however, refused to accede to this request, and, accordingly, the shipment 165
could not be effectuated.

The purported substance of the conversation between deponent and Mr. Elkind, upon the latter's receipt of plaintiff's letter dated January 5th, 1933 (Exh. C), as recited in the moving papers, is grossly inaccurate. Mr. Elkind made no assertion during said conversation, either in words or substance, that defendant was not in default in placing orders and did not urge, as now claimed, that the question of any existing default be settled in

166 a proper manner. Nor did deponent state, as claimed in the moving papers, that he saw no reason why the order (of January 3rd, 1933) could not be accepted by plaintiff and applied as a purchase under the existing contract and that it would be so accepted and coal shipped in due course.

Mr. Elkind, in substance, stated that his concern would not acquiesce to the conditions referred to in deponent's letter of January 5th, 1933 (Exh. C), and that plaintiff could either ship the coal or cancel the order. Deponent informed Mr. Elkind that plaintiff could not make the shipment except
167 without prejudice to its rights. A letter confirming this position was sent to defendant by plaintiff's counsel on January 10th, 1933 (Exh. D). In view of the covenants of this letter, it is evident that the moving papers do not state correctly the substance of deponent's talk with Mr. Elkind.

Mr. Couzen's statement at page 3 of his affidavit that, after receipt by defendant of said letter, deponent expressed a willingness to fill defendant's order of January 3rd, 1933, but stated that a contrary decision had been made by others, is inaccurate. Deponent merely advised Mr. Couzens that he was willing to fill the order, but only upon
168 the condition that it be deemed without prejudice to plaintiff's rights.

It is evident from the foregoing circumstances that there is no actual denial that defendant is in default under its said agreement with plaintiff. In this regard, it should be noted that nowhere in the moving papers does there appear any unequivocal assertion that defendant is not in default under its said agreement. On the other hand, the facts hereinabove adverted to, show clearly that defendant was in default to the extent of approximately

16,173 gross tons of coal, when this action was 169
commenced, and that it has repudiated its agreement with plaintiff and has definitely taken the unjustifiable position that it will not perform its contract, unless plaintiff complies with its arbitrary demand for a reduction in price.

Manifestly, under the circumstances, there is not and cannot be any dispute or controversy between the parties that can be referred to arbitration. Defendant's default is so evident, and apparently is not denied, that there is no arbitrable dispute or controversy in that regard. Certainly, defendant cannot arbitrarily demand a modification of the agreement and upon such demand being 170
declined, refuse to abide by the terms of the agreement, and then seek arbitration. Under such circumstances there is no dispute and there is nothing to arbitrate.

The only question left for determination, is the amount of damages sustained by plaintiff as a result of defendant's breach of contract. This question, however, cannot be determined by arbitration. A mere assessment of damage, divorced from the determination of any other dispute between the parties, does not fall within the purview of arbitration. The arbitration law of the State of New 171
York, as deponent has been advised by plaintiff's attorneys and verily believes, does not extend to or include within its embracement assessments of damage, appraisals or the like, where such matters constitute the sole issue between the parties.

Since it appears clearly that there is no arbitrable dispute between the parties, it is evident that arbitration could not be had. It follows, therefore, that defendant is not entitled to stay proceedings. The granting of a stay until arbitration is had,

172 obviously, would be a futility and improper, where it appears, as it does in the present case, that there is no dispute which can be arbitrated. Hence, for this reason alone, defendant's application should be denied.

There is a further objection which deponent believes is fatal to defendant's motion. The agreement upon which defendant bases its right to arbitration and to a stay, provides for arbitration in accordance with the arbitration laws of the State of New York. Consequently, arbitration, if had, would proceed solely in accordance with the requirements of the New York statute relating to
173 arbitration. Deponent submits that this Court has no jurisdiction to compel the parties to arbitrate in accordance with the laws of the State of New York, since that statute is purely remedial and created no substantive rights that could be enforced by a Federal Court. Since this Court would have no jurisdiction to compel arbitration in the instant case, it follows that it has no jurisdiction to stay proceedings until arbitration is had.

Furthermore, it is submitted that defendant is estopped from seeking arbitration or a stay of pro-
174 ceedings in connection therewith, due to the fact that it has appeared and participated, on the merits, in this litigation. Thus, defendant heretofore served a notice of general appearance, by its present attorneys, in this action, and obtained several stipulations extending its time to answer to the complaint herein. Defendant also has moved to dismiss the first cause of action contained in the complaint herein, on the alleged ground that the same fails to state facts sufficient to constitute a cause of action. Under these circumstances, it is clear that defendant has waived any right it may have had to demand arbitration.

It should be noted further that defendant seeks a 175
stay of the trial of this action and all proceedings herein, until arbitration has been had in accordance with the terms of the aforementioned agreement, a copy of which is annexed to the moving papers. This agreement is the one upon which plaintiff's second cause of action is predicated, and, provides for arbitration of disputes arising thereunder. The agreement does not cover disputes between the parties arising out of or in connection with other agreements or circumstances. It is apparent, therefore, that, under this agreement, defendant cannot seek to compel arbitration of any controversy between the parties arising out of the agree- 176
ment referred to in plaintiff's first cause of action.

The agreement for the sale of coal, upon which the first cause of action is based, is an entirely different agreement, and is prior in date to that upon which the second cause of action is predicated. Defendant does not seek arbitration under this prior agreement. Consequently, defendant, under any circumstances, is not entitled to stay proceedings in so far as plaintiff's first cause of action is concerned.

It is submitted, however, that defendant has failed to make out a proper case for arbitration, and, therefore, that it is not entitled to the inciden- 177
tal relief now sought.

WHEREFORE, deponent respectfully prays that defendant's motion for a stay be denied in all respects.

(Sworn to by A. T. Goodenough on April 10, 1933.)

178 **Answering Affidavit of Mark J. Hayes, Read in Opposition to Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

179

State of New York,
County of New York,
Southern District of New York—ss.:

MARK J. HAYES, being duly sworn, deposes and says: That he is the New York sales manager for the plaintiff corporation, and was present at the conference of December 5th, 1932, referred to in the annexed affidavit of A. T. Goodenough, sworn to April 10th, 1933.

180 That deponent has read the said affidavit, and, that the statements therein contained, concerning the said conference and the conversation had thereat, are true.

(Sworn to by Mark J. Hayes on April 10, 1933.)

Opinion.

181

WOOLSEY, *J.*:

I grant the plaintiff's motion to strike out the second separate defense.

I deny the defendant's motion for a stay of the proceedings herein.

I. The plaintiff's motion originally was to strike out both the first and second affirmative defenses pleaded by the defendant. The motion to strike out the first defense, however, was withdrawn and decision is to be made on the motion to strike out the second separate defense which pleads an arbi- 182
tration agreement in the contract between the parties and the cross-motion of the defendant for a stay under that agreement.

II. The arbitration agreement reads as follows:

> "In case any dispute should arise between the buyer and the seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The buyer and the seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator. The decision 183
> of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling specific performance of this arbitration agreement in accordance with the arbitration law of the State of New York."

184 Although it is somewhat inartistically worded, I hold that this arbitration agreement between the parties is to be enforced by the New York State Courts under the New York State Arbitration Statute, Consolidated Laws, C. 72; Laws of 1920, c. 275.

An arbitration agreement having such a provision for enforcement is merely an agreement for the forum of a remedy and does not constitute a defense to an action in this Court or oust this Court from an otherwise appropriate jurisdiction. *California Prune & Apricot Growers Association* v. *Gatz American Company,* 60 F. (2d) 788, 790, 791
185 (C. C. A. 9); *The Fredensbro,* 18 F. (2d) 983, 984-985; *Lappe* v. *Wilcox,* 14 F. (2d) 861, 862, 864.

To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum. *Cf. The Beechwood,* 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself without power adequately to fol-
186 low up the situation, and see that its order or decree is performed by the party against whom it is made.

III. In as much as the parties by their agreement have arranged to arbitrate disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this

cause for a stay pending arbitration, and to leave 187
him to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State.

The New York Arbitration Act gives specific performance of contracts to arbitrate, Consolidated Laws, c. 72, Sections 3, 4 and 5, and in arbitration proceedings in the New York State Courts against the plaintiff here, those Courts might very well, it seems to me, include an injunction or stay against its proceeding with litigation in any other forum—whether federal, state or foreign. For only thus could the New York arbitration proceeding be 188
properly protected and controlled by the New York State Courts.

Settle orders on notice.

November 24, 1933.

JOHN M. WOOLSEY,
United States District Judge.

189

Order With Notice of Entry.

190

At a Stated Term of the United States District Court for the Southern District of New York, held at the court house thereof, in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 14th day of December, 1933.

Present—Hon. John M. Woolsey, *U. S. D. J.*

191

Shanferoke Coal & Supply Corporation of Delaware,

Plaintiff,

—against—

Westchester Service Corporation,

Defendant.

The defendant above named, having duly moved for an order staying the trial of this action, and all proceedings herein until arbitration has been had,
192 in accordance with the terms of an agreement entered into by and between the parties to this action, which agreement is referred to in the second cause of action contained in the complaint, and the said motion having duly come on herein,

Now, on reading and filing defendant's notice of motion dated August 10th, 1933, the affidavit of Ernest E. Wheeler, sworn to August 10th, 1933, defendant's notice of motion dated March 25th, 1933,

and the affidavits of Gerald S. Couzens and Abraham H. Elkind, both sworn to March 24th, 1933, the exhibits thereto annexed and the complaint and answer herein, in support of defendant's said motion, and upon reading and filing the affidavits of A. T. Goodenough and Mark J. Hayes, both sworn to August 30th, 1933, the affidavit of Benjamin Lewis, sworn to September 1st, 1933, the affidavits of A. T. Goodenough and Mark J. Hayes, both sworn to April 10th, 1933, in opposition to defendant's said motion, and after hearing Ehrich, Royall, Wheeler & Walter, attorneys for defendant by Ernest E. Wheeler of counsel, in support of said motion, and Messrs. Moos, Nathan, Imbrey & Levine, attorneys for plaintiff, by Benjamin Lewis of counsel, in opposition to said motion, and due deliberation having been had thereon, and upon reading and filing the opinion of the court, it is 193 194

Now, on motion of Moos, Nathan, Imbrey & Levine, attorneys for plaintiff,

ORDERED, that defendant's motion for an order staying the trial of this action and all proceedings herein until arbitration has been had between the parties, be and the same is hereby denied in all respects. 195

WOOLSEY,
U. S. D. J.

Petition.

196

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Index No. L54—P108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

197

Defendant.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named defendant feeling itself aggrieved by the order made and entered in this cause on the 14th day of December, 1933, denying the defendant's motion for an order staying the trial in this action and all proceedings herein until

198 arbitration has been had between the parties, does hereby appeal from said order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be submitted to the United

States Circuit Court of Appeals for the Second Circuit. 199

Dated, New York, January 10th, 1934.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for the Defendant in Error,
Office and Post Office Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

The foregoing appeal is hereby allowed the 12th day of January, 1934. 200

ROBERT P. PATTERSON,
United States District Judge.

Filed January 15, 1934.

Assignment of Errors.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Index No. L54—P. 108.

201

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

Comes now the defendant Westchester Service Corporation and files the following assignment of

202 errors upon which it will rely upon its appeal from the order made by this Honorable Court on the 14th day of December, 1933, in the above-entitled cause:

(1) The Court erred in denying defendant's motion to stay the trial of this action or proceedings thereunder until an arbitration has been had in accordance with said agreement.

(2) The Court erred in ruling that the arbitration agreement between the parties is to be enforced by the New York State Courts under the New York State Arbitration Statute.

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(3) The Court erred in holding that the defendant was asking the Court to enforce specifically the arbitration agreement.

(4) The Court erred in failing or refusing to grant defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement, as required by paragraphs 2 and 3, Chapter 213, 43 U. S. Statutes 883, entitled "An Act to make valid and enforcible written provisions or agreements for arbitration of disputes arising out of con-
204 tracts, maritime transactions or commerce among the states or territories or with foreign nations."

(5) The Court erred in failing or refusing to grant defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement, as required by paragraphs 2 and 5, Chapter 72, Consolidated Laws of New York, entitled "Arbitration Law".

WHEREFORE, defendant in error prays that said 205
order of said Court may be reversed and that defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement may be granted in all respects, and in order that the foregoing assignment of errors may be part of the record, the defendant in error presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such cases provided, all of which is respectfully submitted.

206

Dated, New York, January 10th, 1934.

EHRICH, ROYALL, WHEELER
& WALTER,
Attorneys for the Defendant in Error,
Office and Post Office Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

207

Citation.

208 *By the Honorable Robert P. Patterson, One of the United States District Judges for the Southern District of New York in the Second Circuit, to Shanferoke Coal & Supply Corporation of Delaware*, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, County of New York, at the District and Circuit above named, on the 10th day of February, 1934, pursuant to an appeal filed in the Clerk's office for the District Court
209 of the United States for the Southern District of New York, wherein Westchester Service Corporation is appellant and you are appellee, to show cause if any there be why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in their behalf.

GIVEN under my hand at the Borough of Manhattan, City of New York in the District and Circuit above named this 12th day of January, in the year of our Lord One Thousand Nine Hundred
210 and Thirty-four, and of the independence of the United States the One Hundred and Fifty Eighth.

ROBERT P. PATTERSON,
United States Judge for the Southern District of New York in the Second Circuit.

Stipulation as to Record.

211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, February 6, 1934.

MOOS, NATHAN, IMBREY & LEVINE,
Attorneys for Appellee.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Appellant.

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Clerk's Certificate.

214

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

215

United States of America,
Southern District of New York—ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

216 IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District, this 7th day of February, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the said United States the one hundred and fifty-eighth.

CHARLES WEISER,
Clerk.

(Seal)

Opinion by L. Hand, *C. J.*

217

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 370—OCTOBER TERM, 1933.

Argued March 31, 1934. Decided April 16, 1934.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against— 218

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before—L. HAND, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York denying a motion to stay an action at law, pending arbitration. 219

ERNEST E. WHEELER, of New York City, for appellant.

BENJAMIN LEWIS, of New York City, for appellee.

L. HAND, Circuit Judge.

The plaintiff, a citizen of Delaware, sued the defendant, a citizen of New York, in the District

220 Court, alleging that the plaintiff was the sole selling agent for the Hudson Coal Company; and that in January, 1931, the defendant promised to buy, and the plaintiff to sell, 75,000 tons of Hudson Company coal spread over five years "in as nearly equal monthly installments as practicable". That since December 1, 1931, the defendant had refused to order 1,250 tons a month, had taken in all up to March 1, 1933, only 16,173 tons, had notified the plaintiff that it would not "order, accept or pay for coal as provided in the agreement", and had thereby repudiated it. That there remained for delivery 52,309 tons, the commissions
221 upon the sale of which the plaintiff had lost and now claimed in the action. The defendant answered, denying a number of the allegations and setting up as a defense a clause in the contract which provided for arbitration "in case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement. * * * In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this
222 arbitration agreement in accordance with the arbitration laws of the State of New York." Thereupon the defendant moved to stay the action under Section 3 of the United States Arbitration Act, Title 9, §3, U. S. Code (9 U. S. C. A. §3). In its affidavits it alleged that it had always been willing to arbitrate the dispute but that the plaintiff had refused to accept an order for coal, and had without cause declared the contract at an end. The plaintiff in its answering affidavits alleged that it had repeatedly tried to compel the defendant

to live up to the contract, but that it had refused 223
on the ground that it could get cheaper coal elsewhere. That the plaintiff had been willing to accept the last order on condition that its acceptance should not affect its rights, but the defendant was unwilling to agree to this, demanding a reduction in the price; that therefore there was no genuine dispute between the parties and nothing to arbitrate. The judge denied the motion; he thought that the arbitration clause confined the parties to an arbitration in the Supreme Court of New York, and that a stay would involve superintendence over such a proceeding, which the Dis- 224
trict Court was unfitted to undertake.

We do not find it necessary to decide whether the arbitration clause at bar was limited to a proceeding in the state court. While it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere, we are content to treat it as exclusive, as the judge did. The District Court could not in that event enforce the clause specifically. *California Prune & Apricot Growers' Association* v. *Catz American Co.*, 60 F. (2d) 788, 85 A. L. R. 1117 (C. C. A. 9). Without the United States 225
Arbitration Act we may assume that it could not even stay the action until arbitration was had in the state court. *The Atlanten*, 252 U. S. 313, 40 S. Ct. 332, 64 L. Ed. 586; though *Pacific Indemnity Co.* v. *Insurance Co. of North America*, 25 F. (2d) 930 (C. C. A. 9), may be read to the contrary. However, Section 3 now specifically provides for a stay, and we have only to decide whether it covers the situation; that is, whether the arbitration must be in a federal court. The

226 decisions in the District Courts are divided. *The Silverbrook* (D. C.), 18 F. (2d) 144, *The Fredensbro* (D. C.), 18 F. (2d) 983, and *The Beechwood* (D. C.), 35 F. (2d) 41, take the view of the Judge below; *Danielsen* v. *Entre Rios Rys. Co.* (D. C.), 22 F. (2d) 326, and *The Volsinio* (D. C.), 32 F. (2d) 357 (semble), are *contra*. So too is *In re Inter-Ocean Food Products, Inc.* v. *York Mercantile Co.*, 206 App. Div. 426, 201 N. Y. S. 536. Under a very similar act in England, it is established law that an agreement to submit to a foreign court justifies the stay of an action brought on the contract elsewhere. *Law* v. *Garrett*, L. R. 227 8 Ch. Div. 26 (C. A.); *Austrian, etc., Co.* v. *Gresham, etc., Society*, L. R. (1903) 1 K. B. 249; *Kirchner* v. *Graban* (1909), 1 Ch. Div. 413; *The Cap Blanco* (1913), Pr. Div. 130. *California Prune & Apricot Growers' Association* v. *Catz American Co., supra* (60 F. (2d) 788, 85 A. L. R. 1117), merely decided, as we have said, that a federal District Court would not specifically enforce an arbitration clause under a local state statute. In *Lappe* v. *Wilcox* (D. C.), 14 F. (2d) 861, a stay was denied under the New York act (Consol. Laws, c. 72), in the case of a contract 228 made before the federal act was passed. We can see no reason for a limited construction, and conclude that Section 3 authorizes a stay even though the arbitration must take place beyond the jurisdiction of the court. In *The Volsinio, supra* (D. C.), 32 F. (2d) 357, the actual ruling was that although this was true, the section was inapplicable, unless the contract was itself "maritime", or "involved commerce", as defined by Section 1 of the Act (9 U. S. C. A. §1). We are not clear that this is true; Section 2 defines those contracts

which it makes "valid, irrevocable and enforce- 229
able", and no doubt such alone are within Section 4. *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 62 F. (2d) 1004 (C. C. A. 2). But it does not follow that Section 3 is so circumscribed; the language is: "If any suit * * * be brought * * * upon any issue referable to arbitration under an agreement * * * for such arbitration." "Such arbitration" may very well refer back to "any issue referable to arbitration", and not to Section 2. The change in language from Section 5 of the New York Arbitration Act, for which, in general, Section 3 of the federal act was copied, was plainly deliberate. In the New York act the 230
clause had read, "under a contract * * * described in section two", and Section 2 of that act was the analogue of Section 2 of the federal act (9 U. S. C. A. §2). "Such arbitration" was very awkward as an equivalent for all that is comprised in Section 2 of the federal act, and suggests a broader intent. It is not necessary, however, to decide the point here, because the contract "involved commerce" as defined by Section 1. The seller, the plaintiff, was to ship the coal on cars f. o. b. Pennsylvania, consigned at the buyer's directions, and, since the buyer's place of 231
business was Yonkers, the "commerce" concerned was between the states.

Again, we scarcely think sufficient the objection, which the judge thought vital; that is, that a stay may involve some supervision over the arbitration. This was raised only to be overruled in *Law* v. *Garrett*, *supra*, L. R. 8 Ch. Div. 26, with which we agree. The defendant's right to a stay presupposes his freedom from "default" at the outset, and perhaps also that he shall never default

232 in performance. Thus it may from time to time be necessary for the court where the action is pending to consider how far he has continued to perform. Even so, the superintendence involved is not beyond the compass of a court of equity; it does not require detailed supervision, like the building of a house, or the manufacture of some especial machine, which is likely to demand repeated recourse to the court.

The plaintiff further objects that the defendant is "in default in proceeding with such arbitration", within the meaning of Section 3. True, it has not named its arbitrator, but in its answer
233 and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. It was the plaintiff who declared the contract to be at an end; and with that the defendant was contented. If the plaintiff meant to proceed further and enforce a claim for damages, the initiative rested upon it; it should have named the first arbitrator. If it did not but sued instead, it was itself the party who fell "in default in proceeding with such arbitration", not the defendant. Under the English act, which is more stringent, a mere affidavit of will-
234 ingness is enough. *Piercy* v. *Young*, L. R. 14 Ch. D. 200, 209. Nor are we impressed with the notion that there was nothing to arbitrate. We may assume arguendo, though we do not mean so to decide, that if a party repudiates a contract in toto, he can neither insist on arbitration, nor compel the opposite side to do so. *Jureidini* v. *National British Millers Ins. Co.* (1915), A. C. 499; *Aktieselskabet* v. *Rederiaktiebolaget Atlanten* (D. C.), 232 F. 403. Here, though the defendant failed to perform, that was not a repudiation, and the

arbitration clause was for the very purpose of ad- 235
justing breaches. We need not say that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration clause (*In re Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 199, 146 N. E. 203); but the plaintiff's own right to repudiate was not so clear as that. We must take the defendant's version on the issue; it says that in December, 1932, it ordered 390 tons of coal, and that the plaintiff accepted the orders and filled them. That in January it again ordered 250 tons more, which the plaintiff refused to de- 236
liver except on condition that its rights should remain unaffected. That the defendant agreed to this, but changed its mind later and cancelled the contract. If all this be true, it is apparent that the plaintiff's right to call off the whole contract and sue for damages was open to debate. *Landes* v. *Kloptock*, 252 F. 89 (C. C. A. 2); Restatement of Contracts, § 317 (2); Comment on Subsection (2); Illustration 7. There was therefore something to arbitrate quite aside from the liquidation of damages. Indeed this alone would be enough, if the merits were otherwise conceded. It is true that the complaint asks for commissions 237
and the plaintiff insists that the liquidation of these requires only an arithmetical computation; but the contract reads as a straight sale, and again it is at least debatable how damages shall be calculated. It is quite true that before any of the modern statutes, provisions in contracts for the arbitration of incidental issues were treated as valid and as conditions precedent. At times it has been thought that the statutes do not cover such arbitrations (*In re American Insurance Co.*,

238 208 App. Div. 168, 203 N. Y. S. 206); though the question is perhaps open in New York (*In re 176 and 178 E. Main Street*, 238 App. Div. 248, 264 N. Y. S. 717). But even if this be true, a clause of general arbitration does not cease to be within the statute when the dispute narrows down to damages alone. *General Footwear Co.* v. *A. C. Lawrence Leather Co.*, 252 N. Y. 577, 170 N. E. 149; *Marchant* v. *Mead-Morrison Co.*, 252 N. Y. 284, 298, 299, 169 N. E. 386. If the clause is general in form, it makes no difference what may come up under it.

239 The stay should be granted, but the District Court will be free without the leave of this court to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration.

Order reversed; cause remanded.

240

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS, 241

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of April, one thousand nine hundred and thirty-four.

Present—HON. LEARNED HAND, 242
HON. THOMAS W. SWAN,
HON. AUGUSTUS N. HAND,
Circuit Judges.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,
Plaintiff-Appellee,

vs.

WESTCHESTER SERVICE CORPORATION,
Defendant-Appellant.

243

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed

244 with costs, and cause remanded with instructions to enter an order in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN,
Clerk.

(Endorsed)

245 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE

—against—

WESTCHESTER SERVICE CORPORATION.

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246 ORDER FOR MANDATE.

United States Circuit Court of Appeals—Second Circuit—

Filed April 23, 1934.

William Parkin, Clerk.

Clerk's Certificate.

247

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 76, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

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Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

as the same remains of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day 249 of July, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

WM. PARKIN,

(Seal)

Clerk.

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.